IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21-7-2006

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

Writ Petition No.10722 of 2006

The General Secretary,
ICF Labour Union/IR,
222/1, ICF North Colony,
Chennai - 600 038. ... Petitioner

Vs.

1. Government of India,
rep.by the Secretary,
Ministry of Labour,
Shram Mantralaya,
New Delhi - 110 001.

2. The Asst.Personel Officer/WS,
Integral Coach Factory,
Chennai - 600 038.

3. The Chief Personnel Officer,
Integral Coach Factory,
chennai - 600 038. ... Respondents

This writ petition is filed under Article 226 of Constitution of India, praying this Court to issue a writ of certiorarified mandamus calling for the records from the files of the 1st respondent bearing No.L-12012/206/2005-IR(B1) dated 16.2.2006 and quash the same and to direct the 1st respondent herein to refer the issue relating to transfer of Shri.G.Sridhar for adjudication to the Central Government Industrial Tribunal-cum-Labour Court, Chennai within a time frame.

For Petitioner : Mr.K.M.Ramesh
For 1st & 3rd respondent : No appearance
For Respondents 2 : Mr.V.G.Sureshkumar

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O R D E R

Prayer in the writ petition is to quash the order of the first respondent dated 16.2.2006 and for consequential direction to refer the issue relating to the transfer of G.Sridhar for adjudication to the Central Government Industrial Tribunal-cum-Labour Court, Chennai.

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2. Brief facts necessary for disposal of the writ petition are that the petitioner Union raised a dispute under Section 2(k) of the Industrial Disputes Act, 1947 challenging the transfer of G.Sridhar before the Assistant Labour Commissioner (Central), Chennai by order dated 18.7.2005. Conciliation proceedings initiated before the Assistant Labour Commissioner failed on the the contentions raised by the respondents 2 and 3 that the transfer is only due to administrative interest and the same is not made due to mala fide intention. The failure report was submitted on 27.9.2005 under section 12(4) of the Industrial Disputes Act, 1947, before the first respondent. The first respondent by the impugned order dated 16.2.2006, refused to refer the issue relating to the transfer of G.Sridhar for adjudication on the ground that the transfer of an employee is the prerogative of the management.

3. The said order is challenged on the ground that the power given under section 10(1) of the Industrial Disputes Act nowhere contemplates to decide a dispute on merits and it is only the administrative power and therefore the first respondent is bound to refer the matter for adjudication. The contention of the petitioner is that the transfer is made on mala fide reason and the same has to be gone into only in the adjudication proceedings before the Labour Court and the first respondent cannot pre-judge the issue and is not entitled to pass the impugned order.

4. The second respondent filed a counter affidavit stating that the transfer of an employee is the administrative action of the management and therefore industrial dispute is not to be raised under section 2(k) of the Industrial Disputes Act and justified the action of the first respondent not to refer the matter for adjudication.

5. I have considered the rival submissions made by the learned counsel for the petitioner as well as the learned counsel for the second respondent.

6. The point in issue is whether the first respondent's action in refusing to refer the matter for adjudication before the Labour Court is right on the basis of the averments made by the petitioner Union that due to mala fide and vindictive action the said Sridhar was transferred.

7. The Honourable Supreme Court and this Court in very many decisions held that the transfer order can be challenged if the same is made on mala fide reason or the same is passed in violation of the statutory provisions. Therefore it cannot be held that transfer is not a dispute.

(a) In the first decision reported in 1987 (1) LLJ 209 (V.Veerarajan and others v. Government of Tamil Nadu and Others) the Honourable Supreme Court held that if the dispute in question raises a question of law the appropriate Government should not purport to reach a final conclusion on the said question of law because that would normally lie within the jurisdiction of the Industrial Tribunal. Similarly, on disputed question of fact, the

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appropriate Government cannot purport to reach final conclusions for that again would be the province of the Industrial Tribunal.

(b) In the decision of a Division Bench of this Court reported in 1987 (1) LLJ 177 (Shaw Wallace & Co. Ltd. v. State of Tamil Nadu represented by the Commissioner and Secretary, Labour Department and others), in paragraph 32, the principles are summarised and it is held that making reference is a rule and refusal to refer is an exception. Paragraph 32 reads as under,

> "32. On a final analysis, the following principles emerge:-
>
> (1) The government would normally refer the dispute for adjudication;
>
> (2) The Government may refuse to make reference, if-
>
> (a) the claim is very stale;
>
> (b) the claim is opposed to the provisions of the Act;
>
> (c) the claim is inconsistent with any agreement between the parties;
>
> (d) the claim is patently frivolous;
>
> (e) the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse;
>
> (f) the person concerned is not a workman as defined by the Act;
>
> (3) The Government should not act on irrelevant and extraneous considerations;
>
> (4) the Government should act honestly and bona fide;
>
> (5) The Government should not embark on adjudication of the dispute; and
>
> (6) The Government should not refuse reference on the ground that domestic enquiry was fairly and properly held and punishment awarded was appropriate."

(c) In 1989 (2) LLJ 558 (Telco Convoy Drivers M.S.Sangh & Another v. State of Bihar and others) it is held that the Government cannot decide the issue on merits and the function of the Government is only administrative function. In paragraphs 11, 13, 14 and 15, the Honourable Supreme Court held as under,

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"11. It is true that in considering the question of making a reference under Section 10(1), the Government is entitled to form an opinion as to whether an industrial dispute "exists or is apprehended", as urged by Mr.Shanti Bhushan. The formation of opinion as to whether an industrial dispute "exists or is apprehended" is not the same thing as to adjudicate the dispute itself on its merits. In the instant case, as already stated, the dispute is as to whether the convoy drivers are employees or workmen of TELCO, that is to say, whether there is relationship of employer and employees between TELCO and the convoy drivers. In considering the question whether a reference should be made or not, the Deputy Labour Commissioner and/or the Government have held that the convoy drivers are not workmen and, accordingly, no reference can be made. Thus, the dispute has been decided by the Government which is undoubtedly not permissible.

12. .....

13. Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power under Section 10(1) of the Act, the function of the appropriate government is an administrative function and not a judicial or quasi-judicial function, and that in performing this administrative function the government cannot delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the Act. See Ram avtar Sharma v. State of Haryana ((1985) 3 SCC 189); M.P.Irrigation Karamchari Sangh v. State of M.P. ((1985) 2 SCC 103); Shambhu Nath Goyal v. Bank of Baroda, Jullundur ((1978) 2 SCC 353).

14. Applying the principle laid down by this Court in the above decisions, there can be no doubt that the government was not justified in deciding the dispute. Where, as in the instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the government in exercise of its administrative function under Section 10(1) of the Act. As has been held in M.P.Irrigation Karamchari Sangh case ((1985) 2 SCC 103), there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the government should be

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very slow to attempt an examination of the demand with a view to declining reference and courts will always be vigilant whenever the government attempts to usurp the powers of the Tribunal for adjudication of valid disputes, and that to allow the government to do so would be to render Section 10 and Section 12(5) of the Act nugatory.

15. We are, therefore, of the view that the State Government, which is the appropriate government, was not justified in adjudicating the dispute, namely, whether the convoy drivers are workmen or employees of TELCO or not and, accordingly, the impugned orders of the Deputy Labour Commissioner acting on behalf of the government and that of the government itself cannot be sustained."

(d) In another decision reported in 1985 (1) LLJ 519 (M.P.Irrigation Karamchari Sangh v. State of M.P.and another), the Honourable Supreme Court held that the Government cannot usurp the powers of the Tribunal in adjudicating the matters. In paragraph 7 it is held as follows,

"7. There may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Government should be very slow to attempt an examination of the demand with a view to decline reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of valid disputes. To allow the Government to do so would be to render S.10 and S.12(5) of the Industrial Disputes Act nugatory."

(e) In 1991 Supp (2) SCC 10 (Dhanbad Colliery Karamchari Sangh v. Union of India) in paragraph 3, the Supreme Court held as under,

"3. After hearing learned counsel for the parties and having regard to the facts and circumstances of the case, we are of the opinion that this appeal must succeed. The Central Government instead of referring the dispute for adjudication to the appropriate Industrial Court under Section 10 of the Industrial Disputes Act, 1947, it itself decided the dispute which is not permissible under the law. We, accordingly, allow the appeal, set aside the order of the High Court and of the Central Government and direct the Central Government to refer the dispute for adjudication to the appropriate Industrial Court under Section 10 of the Industrial Disputes Act, 1947. We further direct the

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Central Government to make the reference within three months."

(f) In the recent decision of a Division Bench of this Court in W.P.No.397 of 2006 (Sivanandha Steel Employees' Union, Chennai v. Labour Officer (Conciliation), Chennai and Others) dated 28.4.2006, this Court directed to refer the dispute, if no conciliation is arrived at within a period of four weeks.

(g) In (2005) 13 SCC 42 (Air India Ltd and others v. Vishal Capoor and others), in paragraph 49, the Honourable Supreme Court gave positive direction to refer the dispute, which is extracted hereunder,

"49. We, therefore, set aside the decision of the High Court and allow the appeals. It is directed that the appropriate Government shall refer the following questions for adjudication by the appropriate Tribunal:

1. Whether the 1998 settlement or any portion thereof is liable to be set aside on the grounds of fraud, undue influence, etc. as alleged by the Adhikari group ?

2. Whether the requirement of the ALTP licence was necessary for co-pilots ?

3. Whether the Adhikari group was entitled to seniority over the CPL-holders in the line seniority list ?

4. What is the legal effect of the Conciliation Officer's recommendation of the Adhikari group's case and Air India's acceptance thereof ?

5. To what relief are the parties entitled ?"

(h) A reference made to the Labour Court was challenged before the Bombay High Court by the employer on the ground that industrial dispute does not exist. A Division Bench of Bombay High Court in the decision reported in 2006 (2) LLN 604 (Philips India Ltd., and another v. P.N.Thorat, Assistant Commissioner of Labour and Conciliation Officer and others) held that whether there are triable issue or not has to be decided only by the Industrial tribunal and not by the High Court under Article 226 of Constitution of India. Paragraph 12 of the said decision can be usefully referred which reads as under,

"12. From the above, what emerges is that there are serious triable issues. The contention of the union and the workmen is that fraud has been practised upon them.

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If the workmen are able to succeed in proving that the agreement was entered into by playing fraud it will be open to them to avoid the settlement. This issue cannot be answered by this Court at this stage as it would require evidence to be led. Prima facie a Division Bench of this Court in the very proceedings has taken note that the employees involved in both the writ petitions would be workmen. The Apex Court, however, left that question to be decided. At any rate the expression workmen considering S.2(s) of the Industrial Disputes Act would include ex-workmen. That contention of the management that they are not workmen would require adjudication of facts. Based on these findings and the issue of pensionary benefits under VRS it will have to be considered whether the dispute partakes of an industrial dispute. This, again would be premature for this Court to decide at this stage and it will be open to the petitioners to raise all it issues before the Industrial Tribunal to which the reference is made. Similarly, the contention of the employer that they have complied with the terms of the settlement and consequently there is no industrial dispute and that the employees cease to be workmen will have to be adjudicated upon by the Tribunal."

(i) In 1997 (2) LLJ 166 (Thiruvalluvar transport Corporation Limited v. K.P.Ganesan), this Court held that the transfer order can be challenged by an employee to approach the forum constituted under the Industrial Disputes Act. In paragraphs 18 and 19 the Court held thus,

"18. I am unable to subscribe to the views expressed by the learned single Judge of the Madhya Pradesh High Court, in view of the catena of judgments rendered by our High Court in the matter of transfer. The power to transfer employees has been considered by this Court in numerous decisions and it has been unilaterally held by this Court that transfer is a general condition of service of the employees, that such transfers are to be effected for the administrative convenience of the employer, that the Court does not sit in appeal nor call for details of administrative exigencies. In B.Varada Rao v. State of Karnataka (1986-II-LLJ-516), the Supreme Court held that it is well understood that transfer of Government servant, who is appointed to a particular cadre of transferable post from one place to another is an ordinary incident of service and therefore, does not result in any alteration of any of the conditions of service to his disadvantage. The Supreme Court declined to accept the case of the

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petitioner therein, that he should not be transferred. S.Mohan, J. (as he then was) in M.Syed Ali v. The General Superintendent, Ennore Thermal Power Station, W.P.No.4214 of 1983, while dealing with the challenge to the order of transfer of a workman from the Ennore Thermal Station, and referring to Standing Order No.17 dealing with the Clerical staff of the Board, which is similar to Standing Order 28 for the workmen, held that there is absolutely no bar for transfer from Ennore Thermal Power Station to another circle. S.Nainar Sundaram, J., (as he then was) also took the same view in W.P.No.5781 and 5869/84. S.Natarajan, J., (as he then was), in the case of Pakkiri v. The Chief engineer/Personnel TNEB, W.P.Nos.1144 to 1146 of 85 dated April 19, 1985, after referring to Clause-28 of the Standing Order, held that the contentions advanced on the basis of the Standing Order were not sustainable. This Court also (AR.Lakshmanan, J.) in Bomman v. Tamil Nadu Electricity Board, 1992 WLR 852, after considering the case of the petitioners therein based on Clauses 17 and 18 of the TNEB standing Orders held that the allegations of mala fides were not made out on the facts of the case. I further observed that only in cases, where the order of transfer is found to be mala fide or in cases where such orders are in colourable exercise of power, the orders would become wholly illegal and void and that transferring a person because he is trouble-some or trouble-maker would in the interest of administration and that such transfers cannot be characterised as punitive. The transfer of the petitioners therein outside the circle in which they were employed was held to be within the competence of the authorities. In (1995-I-LLJ-854) N.K.Singh v. Union of India), the Supreme Court has observed that no roving inquiry into the matter is called for or justified within the scope of judicial review of a transfer scrutinised with reference to the private rights of an individual. It was further held that transfer of a Government servant in a transferable service is a necessary incident of the service career and that assessment of the quality of men is to be made by the superiors taking into account several factors including suitability of the person for a particular post and exigencies of administration.

19. Therefore, in my opinion, the transfer when it is incidence of service and is not affected by mala fide or in prejudice of any binding rule, cannot be judicially reviewed. In this case, though mala fide has

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been alleged against the respondents, the same has not been proved at all. Mere allegation is not proof. In such circumstances, I am of the clear view that the transfer has been made in the routine course as an administrative measure and in public interest."

8. Similar issue arose before this Court in W.P.No.13235 of 2006 etc., batch in which I have considered the power of the Government with regard to the reference of disputes and following some of the decisions cited supra, by order dated 20.7.2006 held that the Government is bound to refer the disputes to the Labour Court as it is not open to the Government to decide the matter on merits since the power vested is an administrative function.

9. From the analysis of the above referred decisions of the Honourable Supreme Court as well as Division Bench of this Court and having regard to the failure report submitted by the Regional Labour Commissioner (Central), Chennai-6, I am of the view that the first respondent is bound to refer the disputes raised by the respective petitioners, as the disputes cannot be adjudicated by the first respondent on merits. Whether the petitioners are entitled to adjudication of disputes in their favour or not is to be decided only by the Industrial Tribunal and not by the first respondent.

10. In the result, I hold that refusal to refer the matter to the Industrial Tribunal (Central) is unsustainable and consequently the impugned order dated 16.2.2006 is set aside. The first respondent is directed to refer the dispute relating to transfer of G.Sridhar for adjudication within a period of four weeks from the date of receipt of copy of this order.

The writ petition is allowed with the above direction. No costs.

Vr

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1.The Secretary to Government of India, Ministry of Labour,
Shram Mantralaya, New Delhi - 110 001.
2.The Asst.Personel Officer/WS,Integral Coach Factory, Chennai - 600 038.
3.The Chief Personnel Officer,Integral Coach Factory, Chennai - 600 038.

+ one cc to Mr.K.M.Ramesh, Advocate Sr.No.32174.
+ one cc to Mr.V.G.Suresh Kumar,Advocate Sr.No.32411.

W.P.No.10722 of 2006

GM(CO)/RSM/28.7.2006

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